

**In The  
Supreme Court of the United States**

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HIGH PLAINS HARVEST CHURCH AND MARK HOTALING,

*Applicants,*

v.

JARED POLIS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF  
COLORADO; AND  
JILL HUNSAKER RYAN, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR  
OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

*Respondents.*

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**To the Honorable Neil M. Gorsuch, Associate Justice of the United  
States Supreme Court And Circuit Justice for the Tenth Circuit**

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**Emergency Application for Injunction Pending Appellate Review**

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## QUESTIONS PRESENTED

Jill Hunsaker Ryan, in her capacity as Executive Director of the Colorado Department of Health and Environment issued Second Amended Public Health Order 20-36 (the “PHO”) which caps attendance at “houses of worship” to 50 people in designated geographic zones without regard to the size of the building and despite allowing numerous secular businesses to operate without any capacity restrictions.

There is a split in the Colorado District Court regarding the constitutionality of the PHO’s capacity limitations. In this case, the District Court declined to enjoin this State’s discrimination against religious activity. In a case that for practical purposes is identical to this one, District Court Judge Domenico did enter a preliminary injunction. *See Denver Bible Church v. Azar*, 2020 WL 6128994 (D. Colo. Oct. 15, 2020) (hereinafter “*Denver Bible Church*”).<sup>1</sup>

The linchpin of the State’s attempted justification for discriminating against churches in favor of secular uses is that somehow churches are uniquely risky environments for spread of COVID-19. But the data are profoundly at odds with the State’s position. In fact, the data support just the opposite conclusion: “[M]ost outbreaks in Colorado have occurred at workplaces, schools, and businesses, not churches. The largest outbreaks in the State have been at colleges and prisons. And the State’s own data show that, of the nearly 900

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<sup>1</sup> Applicants’ case is not moot, because the relief entered in *Denver Bible Church* does not apply to them. Judge Domenico limited the application of his order to the parties in that case. *Id.*, at \*19.

active and resolved outbreaks Colorado has seen to date, only fifteen of those (less than 2%) occurred at a religious facility.” *Denver Bible Church, supra*, at \*12.

Nevertheless, as noted, the district court denied Applicants’ motion for a preliminary injunction, and the United States Court of Appeals for the Tenth Circuit declined to issue an injunction pending appeal. Thus, the questions presented are:

1. Whether the provisions of the public health order that limit in-person attendance at houses of worship to 50 people but allow numerous secular businesses to operate without any capacity restrictions violate the Free Exercise Clause of the First Amendment.

2. Whether Respondent’s decision to grant a *de facto* exemption to its public health order to mass protests on the basis of the content of the views expressed at such protests violates the Free Speech Clause of the First Amendment.

3. Whether the court below erred in concluding that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and the Chief Justice’s concurrence in *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020), allow discrimination against churches in favor of secular activities that in other times would unquestionably be unconstitutional under the First Amendment.

## **PARTIES AND RULE 29.6 STATEMENT**

Applicants are High Plains Harvest Church and Mark Hotaling.

Applicants are the Plaintiffs in the United States District Court for the District of Colorado and the Appellants in the United States Court of Appeals for the Tenth Circuit. High Plains Harvest Church is a nonprofit corporation organized under Colorado law, and it neither issues stock nor has a parent corporation.

Respondent Jared Polis is the Governor of the State of Colorado. He appears in his official capacity. Respondent Jill Hunsaker Ryan is the Executive Director of the Colorado Department of Public Health and Environment (the “Department”). She appears in her official capacity. Respondents are the Respondents in the United States District Court for the District of Colorado and the Appellees in the United States Court of Appeals for the Tenth Circuit.

## **DECISIONS BELOW**

The order of the United States Court of Appeals for the Tenth Circuit dated November 12, 2020, denying Applicants’ motion for an injunction pending appeal is attached hereto as Exhibit A and is available at 2020 WL 6749073. The text of the order of the United States District Court for the District of Colorado dated August 18, 2020, denying Applicants’ motion for an injunction pending appeal is attached hereto as Exhibit B. The order of the United States District Court for the District of Colorado dated August 10, 2020, denying Applicants’ motion for preliminary injunction, which order is on appeal in the circuit court, is attached hereto as Exhibit C and is available at 2020 WL 4582720. The order of

the United States District Court for the District of Colorado dated June 16, 2020, denying Applicants' motion for temporary restraining order is attached hereto as Exhibit D and is available at 2020 WL 3263902.

### **JURISDICTION**

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292. This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

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**TO THE HONORABLE NEIL M. GORSUCH,  
ASSOCIATE JUSTICE OF THE SUPREME COURT AND  
CIRCUIT JUSTICE FOR THE TENTH CIRCUIT**

Applicants High Plains Harvest Church and Mark Hotaling respectfully request a writ of injunction precluding enforcement of absolute capacity limits imposed by Respondents on “houses of worship” in designated geographic zones in Colorado.

Today in Colorado it is perfectly legal for hundreds of shoppers to pack themselves cheek by jowl into a Lowes or other big box store or patronize any one of the thousands of other retail establishments that are not subject to draconian numerical limits. And today in Colorado it is perfectly legal for thousands of protesters to march and stand shoulder-to-shoulder and chant for hours on end, all the while ignoring any semblance of social distancing, so long as the protesters’ message is officially approved by the State. But if 51 people were to meet to worship God in a small rural church in Ault, Colorado, they would do so at the risk of being fined and imprisoned. Applicants feel as though they have stepped through the looking glass into a world where the right to shop for gardening supplies is a favored activity, while meeting as a body to worship God corporately has been relegated to the category of unnecessary of even superfluous.

The State has attempted to justify its discrimination against religious gatherings in favor of secular gatherings on the ground that pursuant to the Court’s decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), it has

practically unlimited power to combat COVID-19. But that is not the law.

As was observed one week ago:

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available.

*Roman Catholic Diocese of Brooklyn v. Cuomo*, 2020 WL 6948354, at \*4 (U.S. Nov. 25, 2020) ) (Gorsuch, J. concurring); See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993); and *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (content-based restrictions presumptively unconstitutional).

The State asserts that “services inside houses of worship where individuals remain seated indoors for long periods of time and mix with people from different age groups – including children who are more likely to be asymptomatic spreaders of the disease – carry a significantly higher risk of transmission.” But the State’s concern about extended indoor gatherings of mixed ages is transparently selective and discriminatory, as even a moment’s reflection will demonstrate. Consider a sold out 737 airplane on a flight from Denver International Airport to New York. The 150 plus passengers may range in age from infants to octogenarians. They are sitting not even six inches – let alone six feet – from each other and are packed like sardines in a pressurized metal tube for three and a half hours. Under the PHO, this is legal. But if 51 socially distanced worshipers sit through a one-

hour religious service in a small rural church, they do so at the risk of being arrested, fined and jailed. It is difficult to imagine more blatantly unconstitutional discrimination against religious gatherings in favor of secular gatherings.

The fundamental error made by the courts below is their apparent willingness to countenance because of the pandemic overbroad, untailed closure orders of indefinite duration directed at all “houses of worship” that in another time would plainly be found to violate the Constitution. But that does not comport with this Court’s decisions. *Roman Catholic Diocese of Brooklyn, supra*, at \*3. Applicants acknowledge that the State has a clear interest in combatting the pandemic. Indeed, if the State truly believes that individuals remaining indoors for long periods of time where there is a mix of different age groups carries a significantly higher risk of transmission, it is free to ban such gatherings. What it cannot do is ban such gatherings if they are of a religious nature while allowing unimpeded identical (indeed, plainly riskier) gatherings of a secular nature. *See Roman Catholic Diocese of Brooklyn, supra*, at \*8 (Kavanaugh, J., *concurring*) (“I do not doubt the State’s authority to impose tailored restrictions – even very strict restrictions – on attendance at religious services and secular gatherings alike.”)

Applicants do not challenge all parts of the public health order. In fact, they have assured the courts below that they are determined to follow all of the regulations that come under the “social distancing” and “hygiene”

rubrics. Thus, the as-applied injunction Applicants seek poses no risk to public health or safety that is not present in comparable secular gatherings

Applicants therefore respectfully request that the Circuit Justice grant this application or refer it to the full Court. Applicants hope to reopen in time for worship this coming weekend, so they request that an injunction issue as early as Friday, December 4, 2020, or as soon thereafter as practicable, and that it remain in effect until such time as the PHO's absolute capacity caps are permanently withdrawn, repealed, or invalidated by a court.

## STATEMENT OF THE CASE

### A. Facts Relevant to Questions Presented

#### 1. The Church Engages in Constitutionally Protected Religious and Expressive Activities

High Plains Harvest Church (the “Church”) is a small church in Ault, Colorado. Exhibit E, p. 5 ¶ 12. The Church’s vision is to be a Christ-centered, rural, regional church that makes a genuine difference in the hearts of people throughout northern Colorado. *Id.*, p. 6 ¶ 21. The Church seeks to create an environment where each person is cultivating daily, life-changing intimacy with the Savior; experiencing biblical community with others in the body of Christ; using their time, talents, and treasures to further God’s kingdom; engaging in intentional discipleship and ministry; and bringing the Gospel into their sphere of influence with word and action. *Id.*

Hotaling is a devout Christian and a pastor in the Church. *Id.* Until the recent COVID-19 outbreak, Hotaling frequently attended and/or led services as the Church. *Id.* He typically attended and/or led three to four services and/or other religious gatherings per week. *Id.*, pp. 6-7 ¶ 22. Hotaling has a sincerely held religious belief that in-person attendance at church is central to his faith. *Id.*, p. 7 ¶ 22.

The Bible commands Christians not to forsake the gathering together of believers. Hebrews 10:24-25. In-person corporate worship is a fundamental tenet of Christian practice and has been for nearly 2,000 years.

Ex. E, p.9 ¶ 39. The Church and its members, including Hotaling, have a sincerely held religious belief that the physical corporate gathering of believers is a central element of religious worship commanded by the Lord.

*Id.*, p. 9 ¶ 40. In their services, Applicants' engage in the following expressive activities: preaching, teaching, praying, singing praises to God, Bible reading and otherwise proclaiming the Gospel of Jesus Christ to the world.

Exhibit F, p. 3 ¶ 8.

In all services, the Church and Hotaling follow government guidelines for faith communities. Ex. E, p. 9 ¶ 43 These guidelines include:

- Encouraging staff and congregants to maintain good hand hygiene
- Encouraging use of cloth face coverings among staff and congregants
- Cleaning and disinfecting frequently touched surfaces at least daily and shared objects in between uses
- Promoting social distancing at services and other gatherings, ensuring that clergy, staff, choir, volunteers and attendees at the services follow social distancing throughout services

*Id.*

Hotaling and the Church also intend to follow the social distancing standards set forth by the Department. *Id.*, p. 10 ¶ 44.

The Church, in furtherance of the sincerely held religious beliefs of its members, desires to engage in-person worship services in numbers greater than 50. *Id.*, p. 9 ¶ 42. And it is a substantial burden on the religious exercise of the Church and its members if they cannot do so. *Id.*, p. 9 ¶ 41.

## 2. The COVID-19 Pandemic

In December 2019, a novel coronavirus known as SARS-CoV-2 was first detected in Wuhan, China causing outbreaks of the coronavirus disease COVID-19 that has now spread globally.<sup>2</sup> On March 11, 2020, the World Health Organization announced that the COVID-19 outbreak could be characterized as a pandemic,<sup>3</sup> and on March 13, 2020 President Trump declared a national emergency.<sup>4</sup>

As of July 20, 2020, there were 40,566 known COVID-19 cases in the State. Exhibit G, p. 10. As of the same date, public health officials estimated that about 240,000 Coloradans are or have been infected with COVID-19. *Id.* As of July 20, 2020, 6,057 were hospitalized, and 1,615 have died. *Id.* There is no question that COVID-19 is a serious health problem, and Applicants have never suggested otherwise. The issue in this case is not whether there is a pandemic that poses a significant health risk. There surely is. The issue is whether the government may engage in flagrant and wholesale discrimination against religious believers in favor of secular activities as it combats the virus. It may not. *Roman Catholic Diocese of Brooklyn, supra*, at \*3 (“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”).

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<sup>2</sup> President Donald J. Trump, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://tinyurl.com/yx3z9jjp>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

### 3. The Public Health Orders

In response to COVID-19, on March 25, 2020, Governor Polis issued a stay-at-home order. Executive Order D 2020-017<sup>5</sup> On April 9, 2020 Director Ryan issued an implementing public health order.<sup>6</sup> In the months since, Governor Polis and Director Ryan have issued a dizzying array of literally dozens of orders and amendments to orders. The latest version of the PHO was issued on November 20, 2020 and is attached as Exhibit H.<sup>7</sup> The PHO establishes the “COVID Dial” under which the regulations for a county vary depending on the “level” the county is in. Ex. H, p. 4. There are six levels designated as green, blue, yellow, orange, red and purple. Ex. H, pp. 4-17. Applicants are in Weld County, which, as of December 1, 2020, is designated as level red. Ex. I. In a level red county, churches may operate at 25% of their posted occupancy limit not to exceed 50. Ex. H, p. 15. Conversely, “Critical Businesses” may continue to operate “without capacity limitations.”<sup>8</sup> The term “Critical Business” is defined to include grocery stores, gas stations,

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<sup>5</sup> Exec. Order D 2020 017, *Ordering Coloradans to Stay at Home Due to the Presence of COVID-19 in the State* (Mar. 25, 2020) <https://tinyurl.com/v6zjrj6>

<sup>6</sup> Fourth Updated Public Health Order 20-24 Implementing Stay at Home Requirements, [https://drive.google.com/file/d/1zYSF3mAD7IMFK3\\_Zh9Q7tQYV\\_KFOIknJ/view](https://drive.google.com/file/d/1zYSF3mAD7IMFK3_Zh9Q7tQYV_KFOIknJ/view)

<sup>7</sup> As the district court noted in *Denver Bible Church* at \*3 n. 18, the constant amendments present a “moving target” for Applicants and the Court. However, the existing PHO as it applies to houses of worship is not materially different from earlier versions for purposes of constitutional analysis.

<sup>8</sup> An exception is “Critical Retail” businesses, which are limited to 50% of posted occupancy limit but have no upper absolute limit. Ex. H, p. 16. This is still far in excess of the houses of worship limit (25% of capacity with absolute limit of 50) and would, for example, allow hundreds of people to enter a big box store while an identical sized church would be limited to 50.

convenience stores, marijuana dispensaries, liquor stores, gun stores, hardware and building material stores, various manufacturers, banks, law offices and accounting offices and schools. Ex. H pp. 37-41.

There is also no upper limit on schools. Instead, “[a] firm student gathering number is not given because school classroom sizes differ between and among districts. Local schools should determine the appropriate gathering size while working towards 6-foot distance in a classroom.” Colorado Department of Education, *Classroom Guidance*, available at <https://www.cde.state.co.us/planning20-21/covid-guidance-saferathome> (accessed December 1, 2020).

Airlines are designated as a “Critical Government Function” (Ex. H, p. 30) and as such may continue to operate “without capacity limitations.” Ex. H, p. 16.

“Critical” businesses are, of course, taking advantage of their exemption from the PHO. When Hotaling went to a local Lowes store, he observed literally hundreds of customers going in and out of the store. Exhibit J p.5 ¶ 21. The parking lot was packed to near capacity, and drivers were circling in hopes of finding a parking spot. *Id.*

#### **4. The *de Facto* Exemption**

The State admits that:

- In late May 2020, nationwide protests broke out over the death of George Floyd. Exhibit K p. 2 ¶ 7.

• Protests<sup>9</sup> began in Denver and elsewhere in Colorado on the evening of May 28, 2020 **and have continued thereafter.** *Id.* (emphasis added).

- At times, the protests have drawn thousands of people. *Id.*
- Some protests have lasted for several hours. *Id.*
- Protestors gathered in close proximity. *Id.*
- Protestors shouted in unison. Ex. K, p. 6 ¶ 33.
- Protestors did not adhere to social distancing. Ex. K, p.2 ¶ 7.

The State also admits that some of the Protests occurred outside the Colorado State Capitol Building where Governor Polis’s office is located. *Id.*

This is a photograph of one such protest:



Ex. E, p. 4 ¶ 10.

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<sup>9</sup> These protests shall be referred to herein collectively as the “Protests.”

The State has not only permitted these protests to occur, but also it has actively encouraged them. Ex. E, p. 8 ¶¶ 36, 37. In *Soos v. Cuomo*, 2020 WL 3488742, at \*11 (N.D.N.Y. 2020), the court referred to similar conduct by the Governor of New York and said the conduct established a *de facto* exemption to the state’s public health orders. Applicants will use the same terminology.

Respondents have advanced the *de facto* exemption at many levels. Indeed, on the day after the Protests started (May 29, 2020) Governor Polis issued this statement:

We are all filled with grief about the unjust murder of George Floyd and **I stand ready to join hands with those hurting today as we peacefully work for justice.** Today is a new day and it is my hope and the hope of all Coloradans **that any future demonstrations remain peaceful.** To those peacefully protesting at a safe social distance, know that I see you and I am listening.

Ex. F, ¶ 4; Ex. L, p.1. (emphasis added).

Thus, from the very beginning Governor Polis signaled he would allow and even encourage “future” Protests.

On June 2, 2020 Governor Polis held a press conference. Ex. F ¶ 2. At the press conference he reiterated the sentiments expressed in his May 29 statement: “And to those who are peacefully protesting, I want you to know that I see you, I hear you, and I grieve with you. And more importantly, I want to work with you to make Colorado better and America better.”

*Id.*, ¶ 3(a). He stated further: “I **commend** those who peacefully join in the Protests . . .” *Id.*, ¶ 3(b) (emphasis added).

Not surprisingly, after expressing solidarity with and commending the protesters, Governor Polis assured them he would not enforce the PHO to prevent the Protests, because it was “impossible” for the protesters to stay at home. He said:

And by the way, I respect the fact that many Coloradans who joined the Protests concluded it is not possible to stay at home. It is not possible to remain silent in the face of the killing of George Floyd, in the face of ongoing racial discrimination. And I completely respect the fact that those Coloradans consider that essential and they would consider it unconscionable to remain at home. **So staying safer at home wasn’t possible. And we would not ask anybody to stay at home when it’s not possible and when your conscience does not allow you to stay at home.**

Ex. F ¶ 3(i) (emphasis added).

Governor Polis categorically rejected calls to disperse the Protests. He stated: “It is also divisive and sad to hear some call for a more violent crackdown against peaceful demonstrators exercising their First Amendment rights under our Constitution . . . This is not China. This is not Tiananmen Square, and that’s not leadership.” Ex. F ¶ 3(c).

Instead of enforcing the PHO and dispersing the protesters, on June 1, 2020 Governor Polis issued a joint statement with Denver Mayor Michael Hancock in which they stated:

Denver police, our mutual aid partners and a small contingent of Colorado National Guard have been working for the past four days and nights **to support peaceful protests in Denver . . .**

Ex. F ¶ 7; Ex. L p. 2 (emphasis added). Stunningly, instead of sending troops to enforce the law, Governor Polis sent troops in support of those who were acting in flagrant disregard of the law.

The governor also applauded local law enforcement's decision to actually join the Protests: "I was glad to see the Denver Police Chief yesterday join arm-in-arm with those who exercised their free speech to protest the unjust murder of George Floyd." Ex. F ¶ 3(d).

At his June 2 press conference Governor Polis related that he had been in a conference call in which he discussed the distribution of masks to aid the protesters:

Of course I expressed on the call the concern that protesters might encounter corona virus and that could lead to public health setbacks. I talked about how masks were made available for some of the protesters in Colorado and how we are encouraging testing. **And I hope that serves as an example to governors in other states to open up testing and to the extent they can, masks**, to help keep those who are exercising their First Amendment rights as safe as possible.

Ex. F ¶ 3(j) (emphasis added).

Far from undertaking his constitutional duty to ensure the faithful execution of the laws of the State, Governor Polis was proud of the fact that masks were distributed to aid the lawbreakers.

Governor Polis knew the Protests were not safe. In his press conference he stated, "It is not safe to be clustered together in a small outdoor

areas.” Ex. F ¶ 3(h). Moreover, the governor’s own public health experts informed him the Protests posed a catastrophic risk. He said:

One of my greatest fears in watching the events over the last weekend is that so many people gathering in one place together will increase the spread of corona virus across our nation and here in Colorado. Only in the coming weeks will we see the full impact of these large gatherings. **But health experts tell me it could result in hundreds of new cases and untold pain, death and suffering** just as we were making progress. At least I was glad to see many protesters, hopefully most, wearing masks to protect themselves and those around them from corona virus.

Ex. F ¶ 3(e) (emphasis added).

The public health risks of the Protests weighed on Governor Polis to such a degree that he lost sleep:

You know we need to remember that we are dealing with a global pandemic. And we should all be wearing masks whenever we are interacting with others outside of our household and take the proper precautions in every situation to try to be six feet from others. And while it was encouraging to see so many of the protesters do that, **as governor it certainly kept me up at night worrying about thousands or tens of thousands of people congregating and the health risk to our state** for this justified cause.

Ex. F ¶ 3(g) (emphasis added).

The governor even admitted that the Protests are **riskier** than organized activities (activities such as the church services Applicants wish to conduct):

That’s one of the real public health issues around these large protests, is [] you can’t do meaningful contact tracing other than that if there is a group of people that went together . . . **That’s why it is of a very different nature than an organized sport or an activity where we know who’s doing it.**

Ex. F ¶ 3(k) (emphasis added). Nevertheless, he not only allowed the Protests, he actively encouraged them.

The Department has actively encouraged the Protests as well. Indeed, it has gone so far as to issue “guidance” for the benefit of the protesters. Exhibit M (the “Protester Guidance”). Of course, if the Department intended to enforce the PHO with respect to the Protests, the Protester Guidance would have been unnecessary, and the only “guidance” the Department would have needed to issue was a warning that the Protests were unlawful. But the Department never had any intention of enforcing the PHO against the protesters, a position it communicated tacitly by issuing the Protester Guidance in the first place and expressly with the following passage:

**It is important for people to be able to demonstrate peacefully and have their voices heard.** We strongly encourage all participants – protestors, law enforcement, and members of the media – to follow these guidelines to stay safe and protect themselves from COVID-19 transmission if attending protests or demonstrations.

Ex. M, p. 1 (emphasis added).

The Protester Guidance continues: “Wearing a mask is very important if you plan to gather in **large groups** . . .” *Id.*, p. 2 (emphasis added). The Protester Guidance presupposes that protests in “large groups” are going to occur. The Protester Guidance was obviously intended to guide and encourage the Protests. It goes on to state: “**We want you to use your voice for issues that are important to you. Please do so safely.**”

Ex. M, p. 3 (emphasis in the original).

Finally, in June 2020, the Department issued a statement in which it said it continues “to do everything possible to limit and slow the spread of COVID-19, **but we also acknowledge that the scourge of systemic racism weighs heavily on the public’s mind, and understand the need to protest or demonstrate peacefully.**” Ex, F ¶ 9 (emphasis added). It is difficult to imagine a clearer statement demonstrating that the Department approved of and encouraged the Protests.

#### **B. Relevant Procedural History**

Applicants filed their complaint on May 25, 2020. Contemporaneously, they filed their first motion for a temporary restraining order and preliminary injunction. Applicants withdrew their motion for preliminary relief on May 30, 2020 after this Court entered its order in *South Bay*. But after the State granted the *de facto* exemption to the Protests, Applicants amended their complaint and renewed their motion for a temporary restraining order and preliminary injunction on June 10, 2020.

The district court refused Applicants’ request for a hearing, and on June 16, 2020 it denied Applicants’ motion for temporary restraining order and set a lengthy briefing schedule on their motion for preliminary injunction. On August 10, 2020, the district court denied Applicants’ motion for preliminary injunction. The district court denied Applicants’ motion for an injunction pending appeal on August 18, 2020. The Tenth Circuit denied Applicant’s motion for injunction pending appeal on November 12, 2020.

## REASONS FOR GRANTING THE APPLICATION

### A. The All Writs Act Standard

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are “critical and exigent;” (2) the legal rights at issue are “indisputably clear;” and (3) injunctive relief is “necessary or appropriate in aid of the Court’s jurisdiction.” *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). A Circuit Justice or the full Court may also grant injunctive relief “[i]f there is a ‘significant possibility’ that the Court would” grant certiorari “and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted.” *Am. Trucking Ass’ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a “fair prospect” of reversal). Such a possibility exists in this case as demonstrated by the Court’s decision in a substantially similar case last week. *See Roman Catholic Diocese of Brooklyn, supra*.

### B. The State Has Clearly Violated Applicants’ Free Exercise Rights

The First Amendment provides that the government “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. As this Court has explained, in addition to protecting freedom of religious belief, “the ‘exercise of religion’” protected by

the First Amendment “often involves not only belief and profession but the performance of [] physical acts,” including “assembling with others for a worship service” and “participating in sacramental use of bread and wine.” *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The Free Exercise Clause “bars even ‘subtle departures from neutrality’ on matters of religion.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. \_\_\_, 138 S. Ct. 1719, 1731 (2018), quoting *Lukumi*, 508 U.S. at 534. Although the Court has held that religious exercise concerns do not generally “relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability,’” *Smith*, 494 U.S. at 879 (citation omitted), “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546. “Strict scrutiny is a searching examination, and it is the government that bears the burden” of proof. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 310 (2013). Specifically, the government must establish that the law is “justified by a compelling governmental interest and . . . narrowly tailored to advance that interest.” *Lukumi*, 508 U.S. at 531-32. The government must also show that the burden on religious practice is the “least restrictive means” of achieving its asserted interest. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981).<sup>10</sup> Because the burden on the

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<sup>10</sup> This aspect of *Thomas* was not abrogated by *Smith*. *Smith* narrowed the category of regulations subject to strict scrutiny. It did not, however, change the standard of review for those regulations that remain subject to strict scrutiny.

government is so heavy, such a law will survive only in “rare cases.” *Lukumi*, 508 U.S. at 546.

It is a substantial burden on the religious exercise of the Church and its members if they cannot meet for in-person corporate worship as a body of believers in numbers greater than 50. Ex. E, p. 9 ¶ 41. But to do so would violate the PHO, and the State has announced its intention to enforce the PHO and has in fact previously done so against third parties.

Ex. K, p. 8 ¶ 47. Penalties, including fines and jail time, may be assessed for violations of the public health orders. *Id.*, p. 3. ¶ 11. Accordingly, Applicants reasonably fear prosecution, including fines, arrest, and jail, if they meet for in-person corporate worship in a group of more than 50 worshipers.

Ex. E, p. 10, ¶ 46.

When government actions “target[] religious conduct for distinctive treatment,” they are neither neutral nor generally applicable, and strict scrutiny applies. *Lukumi*, 508 U.S. at 534, 546. To determine whether a law burdening religion is “neutral” or “generally applicable,” “we must begin with its text, for the minimum requirement of neutrality is that a law must not discriminate on its face.” *Lukumi*, 508 U.S. at 533. The Court must also assess whether it is neutral in “operation,” as assessed in “practical terms.” *Id.* at 536; *cf. Smith*, 494 U.S. at 884 (“[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason”).

The plain text of the PHO expressly singles out “houses of worship,” subjecting them to uniquely burdensome restrictions that do not apply to many secular businesses. The PHO purports to mandate a general limit on non-essential gatherings across the State. But the PHO is neither neutral nor generally applicable because it is chockablock with both express and *de facto* exemptions for secular activities that do not apply to religious activities. The express exemptions include exemptions for schools, airplanes, pharmacies, grocery stores, gas stations, convenience stores, marijuana dispensaries, liquor stores, gun stores, hardware stores, various kinds of factories, laundromats, banks, and law and accounting offices. Ex. H, pp. 37-41. These exemptions are, for practical purposes, indistinguishable from the exemptions that led the Court to enjoin the New York order in *Roman Catholic Diocese of Brooklyn, supra*. As was observed in that case:

As almost everyone on the Court today recognizes, **squaring the Governor’s edicts with our traditional First Amendment rules is no easy task**. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of “essential” businesses and perhaps more besides.

*Roman Catholic Diocese of Brooklyn, supra*, at \*4 (Gorsuch, J. concurring) (emphasis added). See also *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (enjoining order due to pervasive system of secular exemptions); *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249 (W.D. Ky. 2020) (enjoining

COVID-19 public health orders that discriminated against religious gatherings in favor of secular gatherings); *Soos v. Cuomo*, 2020 WL 3488742 (N.D.N.Y. 2020) (same); *First Baptist Church v. Kelly*, 2020 WL 1910021 (D. Kan. 2020) (same).

It is particularly anomalous for literally hundreds of shoppers to crowd into a Lowes, when the church down the street is limited to 50 worshippers. *See South Bay, supra*, 140 S. Ct. at 1615 (2020), Kavanaugh, J. *dissenting* (“Assuming all of the same precautions are taken, why can someone safely walk down a [] store aisle but not a pew?”). “As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non- discriminatory law.” *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (*per curiam*). An “exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). *See also Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 661 (E.D.N.C. 2020) (“These glaring inconsistencies between the treatment of religious entities and individuals and non-religious entities and individuals take [the Executive Order] outside the safe harbor for generally applicable laws.” (citation and quotation marks omitted)); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 459 F.Supp.3d 847, 855 (E.D. Ky. 2020).

In addition to these express exemptions, the State has extended the *de facto* exemption to the Protests. Thousands of protesters marched, chanted, and stood shoulder-to-shoulder for hours on end, all the while ignoring any semblance of social distancing. Far from prohibiting these gatherings, the State actively encouraged them. This is as clear an example of a departure from the principle of neutrality as it possible to imagine. It makes no difference to the analysis that the protesters also have First Amendment rights. “[R]especting some First Amendment rights is not a shield for violating others. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607–08 (2020) (Alito J., *dissenting*).

In summary, the PHO is not generally applicable nor neutral because the State has discriminated both facially in the text of the PHO and practically by allowing the *de facto* exemption. Accordingly, the PHO is subject to strict scrutiny.

**C. The State’s Asserted Justifications for its Discrimination Are Meritless**

To support its case, the State relied heavily on the Declaration of State Epidemiologist Dr. Rachel Herlihy. A copy of her declaration is attached as Exhibit N. It is clear, however, that the State has applied even its own expert’s advice in a selective fashion that discriminates against people of faith in favor of secular gatherings. Dr. Herlihy states:

By contrast, **individuals in a school, house of worship, or other assembly hall**, are in contact with one another for an

extended period of time. That extended period of time in contact results in an increased risk of transmission.

Ex. N, p. 6 ¶ 55 (emphasis added).

The State's own expert affirmatively states that schools and houses of worship present similar risks. Yet the PHO places an occupancy cap on houses of worship but not on schools. Instead, the Colorado Department of Education has published *Classroom Guidance* in which it states: “[a] firm student gathering number is not given because school classroom sizes differ between and among districts. Local schools should determine the appropriate gathering size while working towards 6-foot distance in a classroom.”

Colorado Department of Education, *Classroom Guidance*, available at <https://www.cde.state.co.us/planning20-21/covid-guidance-saferathome> (accessed December 1, 2020). The State is engaging in blatant discrimination against religious gatherings in favor of secular gatherings that its expert admits present similar risks.

The State also asserted that houses of worship are unique in that “close contact” occurs in churches that does not occur in secular gatherings.

This argument also fails based on the State's own evidence, as Judge Domenico demonstrated:

According to [State Epidemiologist, Dr. Rachel Herlihy], ‘data are insufficient to precisely define the duration of exposure that constitutes prolonged exposure and thus a close contact. However, a close contact is defined as being within 6 feet for at least a period of 15 minutes to 30 minutes or more depending upon the exposure.’ So according to the State's own evidence, for a contact to be ‘close’ and thus significantly riskier, it must (1) be

within six feet and (2) last for more than fifteen minutes. If so, a limit on either proximity or duration is adequate to avoid risky close contacts. And under the Distancing Requirements of Public Health Order 20-35, no entity open to the public, including houses of worship, may allow non-household person-to-person contact indoors within six feet. So even without an occupancy restriction, Plaintiffs are subject to a regulation that prevents one of the two necessary components of a risky close contact. That, according to the State's own evidence, ought to be enough. **And, for most other critical businesses, it is: warehouses, schools, critical manufacturing, groceries, pharmacies, liquor stores, and others are allowed to operate at full capacity for presumably full shifts of well over an hour, on the assumption that the distancing restrictions will be adequate to protect against virus transmission.**

*Denver Bible Church, supra*, \*12 (internal citations omitted; emphasis added).

The data simply do not support the State's assertion that churches are uniquely risky. Indeed, just the opposite appears to be the case: "[M]ost outbreaks in Colorado have occurred at workplaces, schools, and businesses, not churches. The largest outbreaks in the State have been at colleges and prisons. And the State's own data show that, of the nearly 900 active and resolved outbreaks Colorado has seen to date, only fifteen of those (less than 2%) occurred at a religious facility." *Denver Bible Church, supra*, \*12.

The State has also asserted that it has not discriminated against houses of worship, because venues such as movie theaters are subject to even more severe restrictions. This argument also misses the mark, as was explained in *Roman Catholic Diocese of Brooklyn, supra*:

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie

theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class.

*Id.*, at \*8 (Kavanaugh, J. *concurring*) (citations omitted; emphasis in original).

In March 2020, there was a great deal of uncertainty about the COVID-19 virus. Indeed, the since discredited Imperial College of London model that predicted 2.2 million U.S. deaths caused widespread panic among policy makers.<sup>11</sup> Given this uncertainty, there is no doubt that the State had wider latitude in its response in the early days of the pandemic. But as time passed it became abundantly clear that the doomsday scenarios peddled by certain prognosticators were not merely wrong; they were wildly inaccurate. Consequently, it has become harder – indeed impossible – for the State to justify continuing its policy of cracking down on churches while permitting Walmarts, Home Depots, airlines – in fact the majority of secular activities – to operate in a more or less business as usual mode (at least insofar as occupancy caps are concerned). Judge Domenico stated this principle as follows:

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<sup>11</sup>Karl Dierenbach, *The Federalist, Insane Model Means Colorado's COVID-19 Policies Are Essentially Based On Tarot Cards* (August 13, 2020), available at <https://thefederalist.com/2020/08/13/insane-model-means-colorados-covid-19-policies-are-essentially-based-on-tarot-cards/>

What may have been permissible at one point given exigencies and realistic alternatives in the face of those exigencies may not remain permissible in the long term. *Cf. Wiley & Vladeck, supra*, at 182 (“The suspension principle is inextricably linked with the idea that a crisis is of finite—and brief – duration. To that end, the principle is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves.”).

*Denver Bible Church, supra*, at \*8.

The court in *Capitol Hill Baptist Church v. Bowser*, 2020 WL 5995126, at \*7 (D.D.C. 2020), reached a similar conclusion: “when a crisis stops being temporary, and as days and weeks turn to months and years, the slack in the leash eventually runs out.” *See also, Calvary Chapel Dayton Valley v. Sisolak*, 2020 WL 4251360 at \*2 (U.S. July 24, 2020), Alito J., *dissenting* (“As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.”).

We will soon begin our second year of dealing with COVID-19. It is fair to say that we have arrived at “the long term.” A temporary suspension of First Amendment liberties was perhaps justifiable in the early days of the pandemic. But the better part of a year later and with no end in sight, it is no longer constitutionally viable for the State to say to people seeking to exercise their religious liberties that they will need to learn to live indefinitely without the sacred practices that have defined their faith for 2,000 years.

#### **D. The State Has Violated Applicants' Rights of Free Expression**

On June 2, 2020, Governor Polis stated that he was willing to allow the Protests to proceed – even while acknowledging they presented an increased risk of infection – because he wanted to protect the First Amendment rights of the protesters. Ex. F ¶ 3(f). But why does he want to protect the protesters' First Amendment rights and not Applicants' First Amendment rights? They are, after all, the exact same right. The reason for the disparate treatment is, of course, Governor Polis favors the protesters' message over Applicants' message.

Governor Polis told the protesters he hears them and wants to work with them to make Colorado a better place. Ex. F ¶ 3(a). He said that the protesters' cause is so vitally important and just that he understands it is literally impossible for them to obey the PHO and stay at home. *Id.* ¶ 3(i). He applauded the Denver Police Chief for walking arm-in-arm with the protesters. *Id.*, ¶ 3(d). He dispatched troops to support the protesters. Ex. L, p.2. Why did he do all of this? Because he says the protesters' cause is “justified.” Ex. F ¶ 3(g). Applicants do not dispute that a message advocating for racial justice is a just message, but the government is prohibited from favoring one message over another even if the message it favors is just.

The State has engaged in “content-based” discrimination. The PHO applies (or do not apply) to the gathering of a group based on the content of the group's speech. If the content of the speech is a protest against racism,

the gathering is exempt from the PHO under the *de facto* exemption. If the content of the speech is any other subject, it is not. Content-based regulations “are presumptively unconstitutional and subject to strict scrutiny.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). As Justice Alito has observed in a case similar to this one, “[F]avoring one viewpoint over others is anathema to the First Amendment. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607–08 (2020), Alito J., *dissenting*.

In their services, Applicants’ engage in preaching, teaching, praying, singing praises to God, Bible reading and otherwise proclaiming the Gospel of Jesus Christ to the world. These expressive activities are quintessential protected expression. Religious speech is as fully protected under the Free Speech Clause as secular speech. *Sumnum v. Callaghan*, 130 F.3d 906, 913-14 (10th Cir. 1997), *citing Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *Watchtower Bible & Tract Soc’y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 161–62 (2002) (preaching entitled to full protection of Free Speech Clause). Yet the PHO imposes restrictions on the Applicants’ religious expression in their services that do not apply to the Protests.

Indeed, because of the *de facto* exemption, if law enforcement personnel were to happen upon a gathering of more than 50 people, they would first have to evaluate the group’s message before deciding whether to enforce the restrictions in the PHO. Is the group advocating racial justice?

Then it is allowed. Are they praying, preaching, singing praises, or proclaiming the Gospel of Jesus Christ? Then it is forbidden. In summary, the State has clearly engaged in constitutionally prohibited content-based discrimination, and therefore its actions are subject to strict scrutiny.

The State asserts that its decision to grant the *de facto* exemption to the Protests was based on practical law enforcement considerations. But that is plainly not the case. As set forth above, Governor Polis granted the *de facto* exemption because he favored the message being conveyed in the Protests. In none of his contemporaneous statements did he suggest that the decision was based on discretionary law enforcement considerations. In *Soos v. Cuomo*, 2020 WL 3488742 (N.D.N.Y. 2020), the court rejected a similar argument. The court wrote:

Governor Cuomo and Mayor de Blasio could have just as easily discouraged protests, short of condemning their message, in the name of public health and exercised discretion to suspend enforcement for public safety reasons instead of encouraging what they knew was a flagrant disregard of the outdoor limits and social distancing rules. **They could have also been silent. But by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of preferential treatment.**

*Id.* \*12 (emphasis added).

Similarly, in *Capitol Hill Baptist Church v. Bowser*, 2020 WL 5995126 (D.D.C. 2020), the court held that when high-profile government officials encourage protests, it sends a clear message that such protests deserve preferential treatment. *Id.*, \*8, *citing Soos*. The court noted that the city's

mayor could have been silent or discouraged the protests, but she did not, and “[h]er actions speak volumes.” *Id.*

The same applies in this case. Governor Polis cannot reasonably argue that his decision to let the Protests occur in flagrant disregard of the PHO was based on public safety considerations. Instead of encouraging the protests, he could have remained silent. He did not. He affirmatively encouraged the protesters to disregard the PHO and thereby sent a clear message that the Protests “are deserving of preferential treatment.”

**E. *Jacobson* Does Not Require Suspension of Constitutional Norms**

The State cites *Jacobson, supra*, as interpreted by the Chief Justice in his concurrence in *South Bay, supra*, for the proposition that it has practically unlimited power to enact regulations to combat COVID-19. The Tenth Circuit also cited *Jacobson* as interpreted in *South Bay* in support of its order denying an injunction pending appeal. *High Plains Harvest Church v. Polis*, 2020 WL 6749073, at \*2 (10th Cir. Nov. 12, 2020). This was error, as explained in *Roman Catholic Diocese of Brooklyn, supra*:

Not only did the *South Bay* concurrence address different circumstances than we now face, that opinion was mistaken from the start . To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905). But *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.

*Roman Catholic Diocese of Brooklyn, supra*, at \*5 (Gorsuch, J. concurring).

## F. The PHO Fails Under Strict Scrutiny Review

The PHO's attendance cap and the *de facto* exemption are subject to strict scrutiny. Therefore, the government must prove they are narrowly tailored to further a compelling government interest by the least restrictive means in order for them to survive. *Lukumi*, 508 U.S. at 531-32. It clearly cannot do so, because the restrictions are far from narrowly tailored or the least restrictive.

First, the fact that numerous comparable secular businesses are not subject to any capacity restrictions at all shows that these limits are not the least restrictive means of combatting the spread of COVID-19. As the Court noted in *Roman Catholic Diocese of Brooklyn, supra*:

[T]here are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows.

*Id., supra*, at \*2.

The PHO suffers from a similar infirmity. It sets the following limit, no matter the size of the building: "Houses of worship and Life Rites may operate at 25% of the posted occupancy limit indoors not to exceed 50 people excluding staff." Ex. H p. 15. Thus, a mega-church with a 3,000-seat

sanctuary is subject to the same limit as a tiny church meeting in a storefront. And both churches are subject to absolute caps that do not apply to numerous secular businesses.

If many secular businesses can be trusted to operate safely without onerous capacity restrictions, so, too, can churches. *See First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670-71 (5th Cir. 2020) (Willett, J., concurring in grant of injunction pending appeal) (Singling out houses of worship cannot possibly be squared with the First Amendment); *see also South Bay, supra*, 140 S. Ct. at 1615 (Kavanaugh, J. dissenting).

The PHO also burdens substantially more speech than is necessary to further the government's legitimate interests. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). By allowing numerous express and *de facto* exemptions, the government has shown it can accomplish its interest in more narrow ways than outright forbidding religious gatherings beyond the draconian limits in the PHO as long as Applicants ensure the maintenance of social distance (which, incidentally, Respondents have not required of the shoulder-to-shoulder protesters). Applicants are committed to following social distancing rules, and thus the PHO is not narrowly tailored as to religious worship services.

The State must also show that it “seriously undertook to address the problem with less intrusive tools readily available to it,” meaning that it

“considered different methods that other jurisdictions have found effective.” *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). The State cannot meet its burden by showing “simply that the chosen route is easier.” *Id.* at 495. Thus, the State “would have to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason.” *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016). For example, “even if the 50-person limit served a compelling interest, the State has not shown that public safety could not be protected at least as well by measures such as those [the Church] proposes to implement.” *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., *dissenting*).

Finally, the State offers no justification whatsoever for why voluntary compliance has failed to satisfy the compelling public health interest or why potential criminal penalties are necessary to promote compliance by Coloradans engaged in religious activities but not the secular businesses and Protests that are exempt. Indeed, the continued reliance on voluntary social distancing and hygiene restrictions for gatherings of hundreds or even thousands of people in dozens of other categories suggests the burdens on religious services— under penalty of arrest, imprisonment or criminal fine — are not the least-restrictive option to satisfy the State’s interest.

## G. The State’s “Least Restrictive Means” Arguments Fail

The State asserts that it has not restricted religious activity beyond that which is necessary to achieve its asserted interest. But this assertion is belied by its own expert. As discussed in detail above, State Epidemiologist Dr. Rachel Herlihy opined that gatherings in a school present similar risks to gatherings in a house of worship. Ex. N, p. 6 ¶ 55. But the State’s regulations do not impose occupancy limits on schools. Instead, the regulations depend on social distancing to minimize risks in that setting. The inescapable conclusion from these regulations is that the State actually believes that the risks associated with gatherings that are similar to religious gatherings can be adequately mitigated through social distancing. Judge Domenico has so held:

[Social distancing], according to the State’s own evidence, ought to be enough [to prevent risky close contact]. And, for most other critical businesses, it is: warehouses, **schools**, critical manufacturing, groceries, pharmacies, liquor stores, and others are allowed to operate at full capacity for presumably full shifts of well over an hour, on the assumption that the distancing restrictions will be adequate to protect against virus transmission.

*Denver Bible Church, supra*, \*12 (internal citations omitted; emphasis added). It follows that social distancing is a less restrictive alternative to the occupancy limits the State has placed on churches. Therefore, the State has not met its burden under the “least restrictive alternative” factor.

The State also argues that churches have no reason to complain because they can go online, broadcast their services or host drive-in services.

This Court rejected a similar argument in *Roman Catholic Diocese of Brooklyn, supra*:

If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.

*Id.* at \*3.

The same principal applies in this case. If only 50 are allowed to attend a service at the Church, the great majority will be barred, and remote viewing is not the same. In *Capitol Hill Baptist Church v. Bowser*, the court rejected an identical argument, stating:

But the District misses the point. It ignores the Church's sincerely held (and undisputed) belief about the theological importance of gathering in person as a full congregation. . . . The District may think that its proposed alternatives are sensible substitutes. And for many churches they may be. But 'it is not for [the District] to say that [the Church's] religious beliefs' about the need to meet together as one corporal body 'are mistaken or insubstantial.' . . . It is for the Church, not the District or this Court, to define for itself the meaning of 'not forsaking the assembling of ourselves together.' Hebrews 10:25.

*Id.* at \*5–6.

#### **H. Other Preliminary Injunction Factors**

In constitutional cases whether to grant an injunction often turn on likelihood of success on the merits only, usually making it unnecessary to dwell on the remaining three factors. *City of Pontiac Retired Emps. Ass'n v.*

*Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (*en banc*) (*per curiam*).

Nevertheless, Applicants will briefly address these elements. This Court recognizes that the deprivation of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Roman Catholic Diocese of Brooklyn, supra*, at \*3. Meanwhile, an injunction will not harm the State at all, because it is free to enact permissible regulations on church services, including narrowly tailored social distancing conditions, so long as it does not discriminate in favor of secular activities. Finally, it is always in the public interest to prevent the violation of a party's constitutional rights. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (quotations omitted).

## CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Circuit Justice grant this application or refer it to the full Court. Applicants hope to reopen in time for worship this coming weekend, so they request that an injunction issue as early as Friday, December 4, 2020, or as soon thereafter as practicable, and that it remain in effect until such time as the PHO's absolute capacity caps are permanently withdrawn, repealed, or invalidated by a court.

Dated December 2, 2020

*/s/ Barry K. Arrington*

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### **CERTIFICATE OF SERVICE**

I hereby certify that on December 2, 2020, I emailed a true and correct copy of the foregoing to the following:

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